IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. —.

NATIONAL HOSPITAL SERVICE SOCIETY, INC., *Petitioner,*

v.

ALBERT F. JORDAN, Superintendent of Insurance, Government of the District of Columbia, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 29) is reported in 128 Fed. (2nd) 460.

II

JURISDICTION.

1. The opinion of the United States Court of Appeals for the District of Columbia is dated May 28, 1942 (R. 29).

2. The United States Court of Appeals for the District of Columbia, in sustaining the judgment of the District

Court of the United States for the District of Columbia, held that the respondent, Albert F. Jordan, as Superintendent of Insurance of the Government of the District of Columbia, was not estopped by the acts of the prior Superintendents of Insurance.

3. The United States Court of Appeals for the District of Columbia, by its ruling, ignored its own decisions and applicable decisions of this Court in holding that the respondent was not subject to the ordinary rules governing estoppel.

4. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "STATEMENT OF THE CASE" in the Petition, and, in the interest of brevity, the statement is not to be repeated at this point.

IV

SPECIFICATION OF ERRORS.

1. The United States Court of Appeals for the District of Columbia erred in holding that the respondent was not estopped by the acts of the prior Superintendents of Insurance.

2. The United States Court of Appeals for the District of Columbia erred in holding that your petitioner was not entitled to have the acts of prior Superintendents of Insurance considered as a part of the evidence in an injunction proceeding.

3. The United States Court of Appeals for the District of Columbia erred in sustaining the action of the District Court of the United States for the District of Columbia in its refusal to consider the acts of prior Superintendents of Insurance.

V

ARGUMENT.

The United States Court of Appeals for the District of Columbia Erred in Holding That the Respondent Was Not Estopped by the Acts of the Prior Superintendents of Insurance.

The record in this case discloses that the only matter which was presented to the United States Court of Appeals for the District of Columbia was the exclusion of certain testimony covering acts of prior Superintendents of Insurance, which your petitioner considered was vital to its case, and, in reliance upon which acts, your petitioner had become indebted in approximately the sum of $39,000.00.

The petitioner received a permit under Title 5, Section 146 of the Code of Laws for the District of Columbia, complete to March, 1929, being the Act of March 3, 1901, Stat. 1312 (c) 854, Section 754, which is as follows:

> "Permit from superintendent of insurance.—The said superintendent shall, upon the application of any association having the right to do business within said District, as provided by sections 141 to 157 of this title, issue to such association a permit in writing authorizing such association to do business within said District, for which certificate and all proceedings in connection therewith such association shall pay the said superintendent the fee of five dollars."

This Act of Congress gives to the Superintendent of Insurance the right to issue a permit to such an association, and it is not limited to one year, but apparently the Superintendent of Insurance has been collecting a yearly license under this Section of $5.00 a year, to which it is not entitled, but the permit which was granted to the petitioner in 1935 by this Section would be an unlimited permit subject to Section 154 of Title 5, being the Act of March 3, 1901, 31 Stat. 1315 (c) 854, Section 762, which says that

where any association fails to comply with the provisions of this Chapter the Superintendent of Insurance shall give notice to the attorney for said district, who shall immediately commence action against such association to enjoin the same from carrying on any business.

Under date of March 24, 1938, J. Balch Moor, the then Superintendent of Insurance, addressed a letter to W. S. Hanna, Commissioner of Insurance, Baltimore, Maryland (R. 15-17), which clearly indicates that Mr. Moor was satisfied with its fraternal status, and was bearing in mind the fact that the appellan tSociety had gone through a very strenuous financial siege, and that it was entitled to certain considerations and further that he felt that they complied with the fraternal laws of the District of Columbia, and it is agreed (R. 10) that there was no difference in the set-up of the Society in March of 1938, and that of May 20, 1940, when the bill of complaint was filed in this case.

So long as the status of the petitioner remains the same as when the permit was granted to it to act as a fraternal organization by one Superintendent of Insurance and acquiesced in by subsequent Superintendent of Insurance, and no fraud is shown on its part, and it makes the reports required under the Code, there is a contractual relationship between the Department of Insurance and the petitioner, and the Court should have considered this evidence in ascertaining whether or not the petitioner was entitled to continue to do business in the District of Columbia as a fraternal organization.

The United States Court of Appeals for the District of Columbia Erred in Holding That Your Petitioner Was Not Entitled to Have the Acts of Prior Superintendents of Insurance Considered as a Part of the Evidence in an Injunction Proceeding.

It is the contention of the petitioner that the respondent is estopped to refuse to permit the petitioner to continue as a fraternal organization in the District of Columbia, so

long as it is not guilty of some fraud or failure to report in accordance with Title 5, Section 154 of the Code of Laws for the District of Columbia, complete to March, 1929.

In the case of *District of Columbia* v. *Cahill,* 60 Apps. D. C., 342, 54 Fed. (2nd) 453, that Court said, in affirming the decision of the Trial Court, which had granted a decree permanently enjoining the District of Columbia from canceling or revoking a certain certificate issued to appellee by the Inspector of Buildings of the District of Columbia permitting the use and occupancy as a garage of the building known as 1615 O St., N. W.:

> "It follows from these facts and circumstances that the District of Columbia is estopped from revoking the certificates of occupancy for garage purposes here in question. The District is acting in this matter as a municipal corporation in relation to strictly corporate affairs, and, where the essential elements of an estoppel are present, it may be estopped by its acts and conduct in like manner and under similar circumstances as in the case of estoppels against individuals. 21 C. J. 1189.
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> 'It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped, or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvement that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied.' (People v. Rock Island, 215 Ill. 488-495, 74 N. E. 437, 440, 106 Am. St. Rep. 179.)
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> 'But although the courts of Illinois do not permit rights to be acquired in city streets and public places by mere adverse possession, yet they have frequently held that the doctrine of estoppel in pais is applicable to municipal corporations, and that they will be estopped or not as justice and right may require; that there may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud,

as where a party acting in good faith under affirmative acts of the city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired. Under such circumstances the doctrine of equitable estoppel will be applied. The court does not consider that there is either danger to the public or injustice in the application of the doctrine of estoppel under such circumstances. In the exercise of proper diligence the public authorities may prevent encroachments upon public streets, and if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action with the apparent approval of every one interested, and the situation is changed by permanent improvements being made, the principles of equity require that the public should be estopped.' Dillon (5th Ed.) vol. 3, par. 1191. See Hagerstown v. R. Co., 123 Md. 183, 196, 91 A. 170, Ann. Cas. 1916B, 1267, 7 A. L. R. 1239.

In our opinion, the instant case is one where, under all the circumstances to assert a supposed public right would be to encourage and promote a wrong, whereby a party acting in good faith under affirmative acts of a municipal corporation, and making expensive and permanent improvements in reliance thereon, would unjustly and inequitably be deprived of the rights which the corporation had granted to him."

Clearly this is a case where the petitioner, acting in good faith, has obligated itself in the sum of $39,000.00 by reason of the acts of the Superintendent of Insurance, and it would be inequitable and unjust at this time to refuse to allow the appellant to continue in business.

In the case of *State ex rel. Caldwell* v. *Lincoln Street Railway,* 80 Neb. 333, 114 N. W. 422, a case in which the street railway had apparently obtained a charter and ordinance, voted upon by the electors, giving it the right to use any street it desired, proceedings were instituted to oust it from the use of the street, and the Court held that by the constitution such a grant is greater than the power vested in the legislature and clearly invalid, and the Court went on to say as follows:

"As to the constructed lines, it would be manifestly unjust, not only to the defendant but to the holders of its securities, to now oust it of rights and privileges which it, and those through whom it takes title, have been claiming and exercising for years with knowlege and acquiescence on the part of the State. The State, like individuals, may be estopped by its act, conduct, silence and acquiescence. In State vs. School District, 85 Minn. 230, 88 N. W. 753, it is said:

'In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable where there have been acts on the part of the State which in terms amount to a waiver. The conduct of a State may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon and that the right to declare such forfeiture is waived. The authority upon this is abundant.'"

In the case of *State ex rel Washington Paving Company* v. *Clausen State Auditor et al.*, 90 Wash. 450, 156 Pac. 554, where a contractor was fraudulently concealing a secret price which gave him an advantage over other bidders, and which became known to the Board of County Commissioners and also the State Highway Commissioners, but who overlooked this fraud and permitted the contractor to continue and finish the work, and then refused to pay on the ground of fraud in the original bid, the Court said:

"This is not a case of estoppel claimed by mere inaction of public officers. It is a case of their acting. Daily did those officials not only permit the delivery of labor and materials on the public property but see to it that it was laid to suit them. * * *

As in Ettor vs. Tacoma, supra, we are of the opinion that the state is estopped. But shall the contractor be relegated to quantum meruit or enjoy the contract itself? We sustain him in the latter. * * *"

In the instant case the prior Superintendents of Insurance had knowledge of everything that was going on, and,

in fact, urged the action of the petitioner, and it appears that the respondent, who was connected with the office of the Superintendent of Insurance since September 21, 1937 (R. 17) had some knowledge of what was going on concerning the petitioner.

In the case of *Essex* v. *New England Telegraph Company,* 239 U. S. 313, 60 L. Ed. 301, 36, Sup. Ct. Rep. 102, where a town had given written permission to a telegraph Company specifying how posts could be placed and wires run, and the Company has complied with such permission, and the town desired to revoke this permission, the Court said at Page 321:

> "Under all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The Company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment * * *; and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation under exceptional circumstances may be held to have waived its rights or to have estopped itself. * * *"

In the case of *City Railway Company* v. *Citizens Railroad Company,* 166 U. S. 557, the Court at Page 566 said:

> "All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the Company incurred a new liability; as, for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. * * *"

In the case of *County of Randolph* v. *Post,* 93 U. S. 502, the Court, at Page 513, said:

> "We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract. * * *"

It is evident from the above cited cases, including the case of the District of Columbia v. Cahill, that municipal corporations and their agents are estopped by the acts of their agents where it appears that the corporation has any authority to do the acts upon which the estoppel is based, and in this case it clearly appears that the acts of the prior Superintendents of Insurance who had issued the permits, and upon whose acts your petitioner became indebted to certain individuals, were in accordance with the authority then vested in those individuals, and it is unlike a case where the official had no authority under any circumstances to do the act relied upon.

The Ruling of the United States Court of Appeals for the District of Columbia Is In Conflict With the Applicable Decisions of Other United States Circuit Courts of Appeals.

The United States Court of Appeals for the District of Columbia, in its opinion, referred to the case of *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 55 S. Ct., 674, said:

> "The petitioner who was chargeable with knowledge of the prohibition of the Statute may not invoke an estoppel to impose a liability which the Statute forbids."

and there was no evidence upon which to sustain such an application of this case, for under the Statute set out above, governing the permits to be issued to fraternal organiza-

tions, it was left to the Superintendent of Insurance to ascertain whether or not the organization had complied with the fraternal laws of the District of Columbia, and he did have the authority to issue such a permit, even though he was in error in his view of the required facts; whereas, in the Awotin case referred to above, there was a direct prohibition by the Statute of the act complained of.

In the case of *Scott County, Ark.* v. *Advance-Rumley Thresher Co.,* 280 Fed. 739, the Court said at Page 748:

> "If the contract was one beyond the power of a county in any circumstances to make, then the keeping and using of the machinery would not constitute an estoppel, and the act of the County under such circumstances could not be ratified. The law is laid down by Dillon on Municipal Corporations, Section 797, as follows: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers but not otherwise. * * *' "

In the case of *Mayor and City Council of Baltimore* v. *Crown Cork & Seal Co., Inc., et al.,* 122 Fed. 2nd, 385, where the city harbor engineer, under the city's chief engineer's orders, prepared plans fixing division line in waters of river between areas wherein the city and corporation, owning lands fronting on the river, were entitled to exercise their respective riparian rights, and upon the basis of which the corporation expended large sums of money, the Court said, at page 390:

> "This conclusion compels the further holding under the Maryland decisions that the City will not now be heard to say that it has not fixed the boundary lines between its property and that of the Chemical Company in the waters of the river, in that the Hammond plan was not authorized or ratified by ordinance of the Mayor and City Council. The evidence shows that the plan was prepared by the Harbor Engineer under the orders of the Chief Engineer, and that the airport was actually constructed with its southern bulkhead

erected upon the Hammond line. Moreover, the Chemical Company was forbidden to erect improvements in the river in accordance with the deed line, and has actually made improvements under permits from the City in the area from which the City now desires to exclude it. In short, the City is now insisting upon a line which under the Hammond plan it rejected.

These facts are sufficient to create an estoppel, which, under the Maryland decisions, the City cannot avoid by the plea that it did not exercise the powers conferred upon it in the proper fashion. In Rose v. Mayor and City Council of Baltimore, 51 Md. 256, 34 Am. Rep. 307, the validity of the purchaser's title to a market stall sold by the City was questioned because of the failure of the City to authorize the sale by ordinance. The suit was brought on notes given by the purchaser in part payment. The Court said (51 Md. at pages 271, 272):

'But it is certainly true that there should be, in all cases, a previous ordinance directing the sales; as by the terms of the power it is contemplated that the judgment and discretion of the Mayor and City Council should be exercised, as to the manner of making the sales, and the term for which the stalls should be sold. However, in a case like the present, where the act done is strictly within the powers of the corporation, and could have been authorized to be done in the manner it has actually been done, but the corporation has failed to comply with some formality or regulation which it should not have neglected, but which has in fact been omitted; in such case, after both parties to the transaction have acted and proceeded as if all preliminary formalities and regulations had been complied with, and rights have attached, the corporation itself could not be heard in a Court of justice to set up, with a view of defeating the rights of the other party with whom it has dealt, that it had neglected to observe some formality or regulation that regularly it should have observed before entering into the transaction in question. This principle of estoppel is applicable to corporations generally; * * * and it is equally applicable to a municipal corporation as to any other.'

Again in Hagerstown v. Hagerstown Ry. Co., 123 Md. 183, 91 A. 170, 7 A. L. R. 1239, Ann. Cas. 1916B, 1267, the City sought to enjoin the Railway Company

from furnishing electric light and power to citizens, because the consent of the City to the exercise of the franchise had not been given by ordinance. The court held that the City was precluded from taking this position, because it had the power to grant the franchise and the Company had exercised the right by building a plant and operating appliances upon the streets, with the knowledge and consent of the proper municipal authorities. These decisions represent the Maryland law today on the point rather than the earlier cases to which the City refers, such as Baltimore v. Eschbach, 18 Md. 276; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; State v. Kirkley, 29 Md. 85; Baltimore v. Musgrave, 48 Md. 272, 30 Am. Rep. 458.

We think, moreover, that the City is estopped in this case to repudiate the Hammond line, even if it did not possess the power to establish divisional lines in the waters of the river. The City was a property owner, and as such, had the undoubted power to make an agreement binding upon it and its next door neighboor, as to the division of riparian rights between them. The Hammond line may deprive the City or the Chemical Company of some part of the area to which it might be entitled under some other apportionment, but the settlement of that line between them need not affect the divisional lines between the other properties in the area. Consequently, the rights of the City as a property owner were affected by acts of its representatives, sufficient to give rise to an estoppel, even though the City in its governmental capacity had no power to establish divisional lines throughout the entire area."

In *Hackett* v. *Ottawa*, 99 U. S., 86, the Court, at page 96, said:

> "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

In the case of *Green County* v. *Tennessee Eastern Electric Co.*, 40 Fed. (2nd) 184, the Tennessee Eastern Electric

Co. did certain work at the request of the County and which was subsequently attacked by the County as ultra-vires and unconstitutional and that the contract was void, and the Court stated at page 186:

> "After the Electric Co. had acted upon this resolution the County could not repudiate it and claim damages for the doing of the thing that it had authorized and induced the Electric Co. to do. The doctrine of estoppel may be invoked against the County as well as an individual. * * *"

In *Quarles* v. *City of Appleton,* 299 Fed. 508, the Court stated at page 516:

> "Estoppel is not limited to instances where the city has entered into an express contract which it would be unconscionable for it to repudiate. In fact, estoppel may arise where no contractual relations (express or implied) are involved, as is illustrated in cases involving street boundaries and individuals' improvements. In fact, there is no good reason why (the necessary facts appearing) a municipality should not be prevented from denying a position, relied upon by an adversary, which it has previously asserted. The doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it. No better statement of this rule can be found than that appearing in Eau Claire Dell's Improvement Co. v. Eau Claire, 172 Wis. 240, 179 N. W. 2, where the court said:
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> 'It is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons.'
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> The same rule is announced in Wykes v. Water Co. (C. C.) 184 Fed. 752, where the Court said:
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> 'That a municipal corporation, equally with a private one, may be estopped from denying the validity of its contract made within the general scope of its powers, although not entered into or carried out in the precise

or formal manner required by law, is well established; and especially is this true with reference to a contract relating to its proprietary, as distinguished from its governmental, functions.'"

In *City of Los Angeles* v. *Borax Consolidated, Limited, et al.*, 102 Fed. (2nd) 52, a case in which the City of Los Angeles admitted that it recognized the principle of estoppel, insofar as it referred to municipalities, but contended that the rule was not applicable to tidelands, for the reason that the City of Los Angeles had no power to make a grant of tidelands, and, consequently, it could not do indirectly what it could not do directly, and the Court, at page 58, stated as follows:

> "We conclude that the City of Los Angeles, owner of the tide lands in the Inner Bay of San Pedro, by virtue of the conveyance to it from the State of California by statutory grant in 1911, had the power and authority to determine the boundary lines of such tide lands by agreement with the upland owners. We hold that the acts and conduct of the city and its officials in charge of the harbor improvements in dealing with the lands claimed by the appellees whereby the appellees had been induced to invest approximately a million and a half dollars, present an exceptional case for the application of the doctrine of estoppel in pais, one clearly within the principle of the decisions of the California Supreme Court in City of Los Angeles v. Cohn, supra, McGee v. City of Los Angeles, supra, and Times-Mirror Co. v. Superior Court, supra, and that the city is therefore estopped from denying that the boundary lines thus recognized by it are not in fact the boundary lines of the uplands claimed by the appellees."

In *County of Parkersburg* v. *Baltimore and Ohio R. R. Co.*, 296 Fed., 74, the Court said, at page 81:

> "When an act is within the general scope of a municipal power and is not expressly forbidden by law, the conduct of its officers may be attributed to a municipality as laches or estoppel, according to the circumstances. * * *"

In the case of *United States* v. *Denver and R. G. W. R. Co. et al.*, 16 Fed. (2nd), 374, the Court said at page 376:

> "The equitable claims of the State or of the United States are no stronger than those of an individual under like circumstances, and a State or the United States may waive a claim under circumstances that would estop an individual from the assertion of a similar claim. * * *"

The foregoing decisions of the various Circuit Courts of Appeals and of this Court definitely hold that where the municipality has any vestige of authority, through its officers, to do the acts upon which other persons or parties have relied and that they have expended moneys or otherwise acted to their detriment, that the municipality would be estopped the same as an individual. It appears from the facts in the instant case that prior Superintendents of Insurance for the District of Columbia gave permits to your petitioner and, by various other overt acts, held your petitioner out as a fraternal organization, and, in reliance upon these various acts, your petitioner has become indebted in the sum of approximately $39,000.00, and there is nothing in the record to indicate that any fraud or injury will be sustained by any individuals, and, under the circumstances, the United States Court of Appeals for the District of Columbia, should have followed the decision of its own Court in the case of the *District of Columbia* v. *Cahill*, and the decisions of the various Circuit Courts of Appeals above set forth.

There is nothing in the record to sustain the statement contained in the opinion of the Court of Appeals for the District of Columbia that:

> "It would be exceedingly prejudicial to the public interest to permit appellant to carry on an insurance business without the safeguard which the Statute requires."

for it had been doing this business for some time in the past and, if it was apparent that there was any injury to individuals by reason of the continuance of your petitioner in business, then the Statute under which it was incorporated gives to the Superintendent of Insurance the right to come into the District Court of the United States for the District of Columbia and ask that an injunction be issued against your petitioner.

CONCLUSION.

It is respectfully submitted that the United States Court of Appeals for the District of Columbia erred in not holding that the respondent, Albert F. Jordan, Superintendent of Insurance, was estopped by the acts of prior Superintendents of Insurance, and that it has failed to give proper effect to the applicable decisions of its own Court, of this Court, and of the various United States Circuit Courts of Appeals, and which are set forth in this petition, and that this case is one calling for the exercise by this Court of its supervisory powers, in order that your petitioner may receive a fair and impartial decision and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

CORNELIUS H. DOHERTY,
Counsel for Petitioner.